Supreme Court, U.S.
FILED
FEB 28 1991
OFFICE OF THE CLERK

No. 90-769

In The

# Supreme Court of the United States

October Term, 1990

LOUISE H. RENNE, City Attorney for the City and County of San Francisco, *et al.*,

*Petitioners,*

v.

BOB GEARY, *et al.*,

*Respondents.*

**On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit**

## BRIEF FOR THE PETITIONERS

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## QUESTION PRESENTED

Does the First Amendment prohibit the determination by the people of the State of California that a ban on official party endorsements in local, judicial and school board elections is necessary to preserve nonpartisanship in those offices?

## LIST OF ALL PARTIES

Petitioner Louise H. Renne is the City Attorney for the City and County of San Francisco. Petitioner City and County of San Francisco is a municipal corporation and a political subdivision of the State of California. As such, it is responsible for conducting federal, state and local elections within its jurisdiction. The remaining petitioners, sued in their official capacities, include the Mayor and the Registrar of Voters of the City and County of San Francisco. Petitioner Board of Supervisors, also sued in its official capacity, is the legislative body of the City and County. Although the validity of a provision of the California Constitution is at issue in this case, neither the State of California, nor any of its officers, were served or appeared.

Respondents Bob Geary, Robert Silvestri, Dennis Mark, Melissa Gundrun, Wayne Johnson, David Soule, Max Woods, Peter Johnson, Robert Gebert, and Terence Faulkner are residents and registered voters of the City and County of San Francisco. Respondents Geary, Faulkner, Woods, Silvestri and Mark are members of various county central committees. Respondent Election Action identifies itself as an organization dedicated to placing measures on the ballot by initiative, and to campaigning for and against ballot propositions. Respondent Sudi Trippet is the coordinator of Election Action.



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## BRIEF FOR THE PETITIONERS

## OPINIONS BELOW

The *en banc* opinion of the Court of Appeals for the Ninth Circuit (Pet.App. A, at p. A-1) is reported at 911 F.2d 280.

The initial Ninth Circuit opinion (Pet.App. B, at p. A-67) is reported at 880 F.2d 1062. The order granting the petition for rehearing and setting a rehearing *en banc* (Pet.App. C, at p. A-113) is reported at 895 F.2d 1230.

The order of the United States District Court for the Northern District of California (Zirpoli, D.J.) (Pet.App. D, at p. A-114) is reported at 708 F.Supp. 278.

## JURISDICTION

Respondents brought this suit on September 11, 1987, in the Northern District of California, invoking federal jurisdiction under 42 U.S.C. sections 1983 and 1985. The District Court's jurisdiction was based on 28 U.S.C. sections 1331 and 1343. On April 27, 1988, the District Court issued its judgment in favor of respondents on their third cause of action, the subject of the instant proceeding. Pet.App. D, at p. A-114.

The Court of Appeals for the Ninth Circuit entered a decision reversing the Northern District's judgment on July 24, 1989. Pet.App. B, at p. A-67. Rehearing *en banc* was granted on February 6, 1990. Pet.App. C, at p. A-113. On August 14, 1989, the *en banc* court affirmed the District Court's judgment. Pet.App. A, at p. A-1.

The jurisdiction of this Court to review the judgment of the Ninth Circuit is invoked under 28 U.S.C. section 1254(1).

## CONSTITUTIONAL, STATUTORY, ETC., PROVISIONS INVOLVED

1. Article II, section 6, of the California Constitution provides as follows:



> (a) All judicial, school, county, and city offices shall be nonpartisan.
>
> (b) No political party or party central committee may endorse, support, or oppose a candidate for nonpartisan office.

2. Article IV, section 4, of the United States Constitution (the Guarantee Clause) provides as follows:

> The United States shall guarantee to every state in this union a republican form of government, and shall protect each of them against invasion; and on application of the legislature, or of the executive (when the legislature cannot be convened) against domestic violence.

3. The First Amendment to the United States Constitution provides as follows:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

## STATEMENT OF THE CASE

Respondents submitted various candidates' statements for publication in the San Francisco voters pamphlet for the June 2 and November 3, 1987 municipal elections. Pet.App. A, p. A-2. The Registrar of Voters refused to publish portions of the statements which referred to endorsements made by the county central committees of ballot-qualified parties. *Id.*

On September 11, 1989, respondents filed suit against the City and various City officials, alleging three causes

of action. J.A. 2. At issue here is the third cause of action, which alleged that Article II, section 6(b) of the California Constitution violates the First Amendment. J.A. 4-5.

Respondents' motion for partial summary judgment on the third cause of action was granted by the Hon. Alfonso J. Zirpoli, by order dated April 27, 1988. Pet.App. D, p. A-114. The City's subsequent motion to vacate the judgment was denied. J.A. 40. The City filed its notice of appeal on June 22, 1988. J.A. 1.

On June 24, 1989, a three-judge panel of the Ninth Circuit issued a decision upholding the constitutionality of section 6(b). Pet.App. B, p. A-67. The Ninth Circuit granted a rehearing *en banc* at respondents' request on October 13, 1989. Pet.App. C, p. A-113. The eleven-judge *en banc* court issued its decision on August 14, 1990, reversing the panel's decision. Pet.App. A, p. A-1.

## SUMMARY OF ARGUMENT

Eighty years ago, California committed itself to nonpartisanship in its local, school and judicial elections. The provision of law at issue in this case, Article II, section 6(b) of the California Constitution, is vital to that commitment.

Article II, section 6(b) of the California Constitution provides:

> No political party or party central committee may endorse, support, or oppose a candidate for nonpartisan office.



Section 6(b) was adopted as the companion to Article II, section 6(a) of the California Constitution, a provision not challenged in this litigation:

> All judicial, school, county, and city offices shall be nonpartisan.

The origins of section 6(a) lie in the 1911 legislation that first established nonpartisan offices in California.

The history of these provisions and the record in this case demonstrate that sections 6(a) and 6(b) serve the same purposes: to keep control of local government and California's judiciary directly in the hands of the people and out of the hands of those who run political parties. Parties have special state-conferred advantages that give them the potential to disproportionately influence local officials and judges if parties are allowed to endorse these candidates for nonpartisan office.

By prohibiting such endorsements, Section 6(b) promotes the impartial administration of the law, as well as the appearance of impartiality. Section 6(b) also furthers the state's interest in fair and effective government and in keeping local government service open to the independent-minded. This Court has long recognized that these interests are compelling. *See Civil Service Commission v. National Association of Letter Carriers*, 413 U.S. 548, 564-67 (1973); *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 789 (1978).

Section 6(b) is narrowly tailored to serve these interests. First, the provision is not underinclusive for failure to ban endorsements by nonpartisan organizations in local and judicial elections. Under California's electoral system, only official, ballot-qualified parties receive the

special statutory benefits in association with partisan elections that can translate into undue influence in nonpartisan elections. *See Austin v. Michigan Chamber of Commerce*, 110 S.Ct. 1391 (1990).

Second, section 6(b) is not overinclusive for banning endorsements by official parties which historically have not been influential in California elections. As the *Austin* Court emphasized, a state may properly regulate the speech of entities with the *potential* to unduly influence the political process, when that potential arises from state-conferred advantages. Under California's election laws, all official parties have that potential.

Third, the absence of proof of any harmful effects from party endorsements before section 6(b) was enacted does not show that the measure is unnecessary. The lack of evidence reflects a simple fact: party endorsements in nonpartisan races occurred only sporadically before section 6(b) was adopted, because it was generally understood that section 6(a) alone proscribed them.

Fourth, while other statutory safeguards of nonpartisanship exist, without an endorsement ban these purportedly "less drastic alternatives" do not sufficiently protect the interests served by section 6(b).

Finally, section 6(b) is not overbroad on the ground that it imposes an absolute ban on party support in nonpartisan races. Given the special advantages the state gives parties in the partisan arena, only a ban of section 6(b)'s scope will eliminate the danger that parties could again exert control over judges and local government. Having already experienced the unhappy consequences of such control once in this century, California is entitled,



within our federalist system, to take the steps necessary to insure that this history not be repeated.

## ARGUMENT

### I. INTRODUCTION

This is a case about political power. At stake is whether local government and judges in California are to be controlled by the people or by those who run political parties.

The citizens of California have voted their choice. Their constitution makes local and judicial elections nonpartisan and bans party endorsements in nonpartisan races. To hold that the First Amendment forbids a state these choices would be a blow to citizen government and to basic notions of federalism.

The people of California adopted nonpartisanship for the most compelling reasons. They wanted to insure the fullest measure of citizen participation and judicial independence. They knew from their own history, and from experience in certain Midwestern and Eastern cities, that party machines had operated most perniciously at the local level. Parties have state-wide and national networks; they have special advantages under state law. Californians knew that with these advantages, parties could close the field in local elections to those who will not toe the party line. And Californians did not want their judges pondering party positions when making legal decisions.

In enacting Article II, section 6(b) of the California Constitution, the voters recognized that party endorsements and nonpartisan elections are incompatible. So long as official parties, with their competitive political advantages, can endorse, parties will have the means to dominate City Hall as they did at the turn of the century. Particularly in counties which have large, one-party majorities, the party leaders' pick for judge or school board will likely decide who can compete effectively for office.

The threat to California's independent brand of local government is clear. The threat to the impartial administration of justice, and to public confidence in California's judiciary, is even clearer. Section 6(b) is the people's answer to those threats.

The promise of our federalist system is that the states serve as the laboratories for diverse democratic forms. To hold that the people of California cannot adopt a measure needed to assure the viability of nonpartisanship would betray that promise. Nothing in the First Amendment commands such a result.

## II. ARTICLE II, SECTION 6(b) SERVES CALIFORNIA'S COMPELLING INTEREST IN PRESERVING NONPARTISAN LOCAL ELECTIONS

In the early years of this century, party machines held a tight grip on local government in California. The Progressive movement that arose in reaction initiated numerous governmental reforms. Primary among them was the institution of nonpartisanship in judicial, school



and local elections.[1] In 1972, this commitment took its modern form under Article II, section 6 [now 6(a)] of the California Constitution: "Judicial, school, county and city offices shall be nonpartisan."[2]

In 1980, the California Court of Appeal confirmed the widespread understanding that under Article II, section 6, party endorsements were unlawful in nonpartisan elections. *See Unger v. Superior Court*, 102 Cal.App.3d 681 (1980) (*"Unger I"*). Four years later, however, the California Supreme Court disapproved *Unger I*, holding that endorsements in judicial elections were permissible

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[1] California's direct primary act of 1911 provided for nonpartisan nomination papers for judicial and school offices. Cal. Stats. of 1911, Ex.Sess., ch. 17, § 3, p. 69.

California's direct primary act of 1913 provided that "[i]n the case of a nomination paper for any candidate for a judicial office, school office, county office, or township office, . . . *no such nomination paper . . . shall contain the name of any political party, or any signer thereto, nor shall the candidate be referred to as a candidate for the nomination of any party.* [Emphasis added.]" Cal. Stats. of 1913, ch. 690, § 5, p. 1388.

In 1926, the prohibition on party nominations of candidates for nonpartisan offices was incorporated in Article II, section 2¾ of the California Constitution.

[2] "Nonpartisan offices" are "office[s] for which no party may nominate a candidate." Cal. Elections Code § 37. Section 35 of the California Elections Code defines "political party" to include those parties that have qualified for the state's primary ballot: the Democratic Party, Cal. Elections Code §§ 8500-8945, the Republican Party, Cal. Elections Code §§ 9000-9510, the American Independent Party, Cal. Elections Code §§ 9600-9745, the Libertarian Party (no separate Elections Code provisions), and the Peace and Freedom Party, (Cal. Elections Code §§ 9750-9855. Ballot-qualified status may be lost when party registration "falls below one-fifteenth of one percent of statewide registration." Cal. Elections Code § 6430.5.

because section 6 did not specifically prohibit them. *See Unger v. Superior Court*, 37 Cal.3d 612 (1984) ("*Unger II*").[3]

The people of California reacted swiftly. At the next general election, held in June of 1986, the voters overturned *Unger II* by adopting the endorsement ban at issue in this case. Cal. Const., Art. II, § 6(b).[4] The voters understood that a ban on party endorsements was essential to serve the interests of independence, impartiality and effective government which underlie nonpartisanship.[5]

The people of California enacted section 6(b) under the guarantees of the Tenth Amendment and Article IV, section 4 of the United States Constitution. "No function is more essential to the separate and independent existence of the States and their governments than the power to determine within the limits of the Constitution . . . the nature of their own machinery for filling local public

---

[3] At issue in *Unger II* was whether the Republican Party had violated section 6 by endorsing and supporting the nonconfirmation of three justices of the California Supreme Court in the 1982 election.

[4] As part of the 1986 ballot proposition that added section 6(b) to the California Constitution, section 6 was renumbered as section 6(a), and the word "All" was added as the first word of the provision.

[5] A few other states have made similar choices. Florida prohibits political parties from endorsing, supporting or assisting candidates in judicial campaigns. Fla.Stat.Ann. § 105.071 (West Supp. 1991). Montana also prohibits political parties from endorsing or contributing to the campaigns of judicial candidates or justices of the peace. Mont.CodeAnn. §§ 13-35-231, 3-10-201(4) (1989). And South Dakota prohibits parties from endorsing or nominating judicial candidates. S.D. Codified Laws Ann. § 12-9-2 (1982).



offices." *Oregon v. Mitchell*, 400 U.S. 112, 125 (1970) (Black, J.). The Guarantee Clause and the Tenth Amendment require that courts "respect the state's most fundamental structural choices as to how its people are to participate in their own governance." L. Tribe, *American Constitutional Law* 398 (2d ed. 1988). Admittedly, these provisions do not immunize a state's regulation of its political processes from scrutiny. *See, e.g., Reynolds v. Sims*, 377 U.S. 533, 582 (1964). But the constitutional origins of such regulation call for courts to balance the interests of federalism against any interest impaired by the regulation. *See generally, Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983).

Quite apart from the constitutional dimensions of the state's interest in section 6(b), both history and the record in this case demonstrate the compelling nature of that interest.

Nonpartisanship in local government has deep historical roots. The framers of the Constitution viewed "factionalism" – their term for partisanship – as one of the most serious evils they sought to remedy. *The Federalist*, No. 10 (Madison) 56-65 (Cooke ed. 1981). The framers saw the problem as most acute in local government, where the parties exercised more direct influence than in the national government they were proposing. *Id.*, No. 10 at 63. The framers were concerned about the tendency of parties and factions to narrow the allegiances of their adherents, deflecting them from consideration of the general welfare in favor of more parochial party goals. *Id.*, No. 10 at 57; No. 76 at 511.

The fears of the framers were confirmed in the early part of this century, when cities such as San Francisco

were plagued by party bossism. Nonpartisan reforms were the result:

> The most important of the civic reform movements took place in San Francisco, where muckraking newspapermen joined forces with business and professional groups to battle one of the most ruthless and graft-ridden city machines in the state. The Union Labor party, under the direction of Abe Ruef, elected its own mayor, captured the police force, and used utilities rates as a means of political payoff. After capturing city hall in 1901, Boss Ruef, through the mayor's office, began a five-year orgy of bribery, blackmail and extortion. Reformers, thoroughly disgusted with party politics and stymied at the polls, turned to the courts. The ensuing graft prosecution, 1906-1909, provided the opponents with the ammunition they needed to start a state-wide campaign against political corruption.

J. Owens, E. Constantini, and L. Wechsler, *California Politics and Parties*, p. 33 (1969).

Ruef's prosecutor, Hiram Johnson, became governor of California in 1910. The next year, California took the first step on the road to nonpartisanship. The 1911 statute creating nonpartisan judicial and school elections, and its statutory successors, were designed to keep parties from reasserting their control over local government and the judiciary. *See* fn. 1 *ante*.

The legislative history of section 6(b) makes clear that banning party endorsements in nonpartisan races was intended to serve precisely the same purpose. As the author of section 6(b) emphasized, nonpartisanship was responsible for the "distinctive quality of the California



political process" as compared to local governments "[i]n many Mid-western and Eastern states." Statement of Assemblyman Richard L. Mountjoy as to Background and Purpose of Proposition 49, 1985, quoted in the Ninth Circuit panel decision, Pet.App. B, p. A-103 fn. 32. Without section 6(b), Mountjoy stated, "political parties will dominate our historically nonpartisan judicial, county and local elections." *Ibid.*

And this message went directly to the voters who enacted section 6(b). The proponents of the measure – Proposition 49 on the June, 1986, California ballot – argued in the ballot pamphlet:

> To assure that our courts will not be manipulated by political bosses, your yes vote on Proposition 49 is absolutely necessary.
>
> WHO WOULD TRUST THE FAIRNESS OF TRIALS TO JUDGES WHO WERE CHOSEN – NOT BECAUSE THEY ARE IMPARTIAL – BUT BECAUSE THEY OWE ALLEGIANCE TO THE POLITICAL PARTIES WHICH GOT THEM ELECTED?
>
> WHO WANTS TO RELY ON THE DECISIONS OF JUDGES WHO ARE CHOSEN – NOT BECAUSE THEY ARE WISE OR BECAUSE THEY KNOW THE LAW – BUT BECAUSE THEY HAVE PROMISED TO TOE THE PARTY LINE?
>
> Californians do not want their judges to become beholden to political parties.
>
> UNLESS YOU VOTE YES ON PROPOSITION 49, JUDGES MAY WELL BE INDEBTED TO PARTY BOSSES TO WIN ELECTIONS. THEIR JOBS WILL DEPEND ON IT.

> Local officeholders support this amendment and are equally concerned that partisan electioneering will harm decision-making at the local level. They are concerned that the more they have to rely on money, help, and endorsements from political machines, the more they will owe the political machines.
>
> Local officeholders do not want to have to check with the party bosses before they make decisions important to their constituents!

Argument In Favor of Proposition 49, California Ballot Pamphlet, Primary Election, June 3, 1986, p. 26, quoted at Pet.App. A, p. A-43 fn. 35.

Like the history of section 6(b), the record in this case demonstrates that the endorsement ban serves the state's interests in independent local government, and in impartial justice and in the appearance of impartial justice.[6] The record reflects the reality that party endorsements are not unilateral recommendations issued by a disinterested central committee; rather they are the result of trade-offs and promises exchanged between the candidates and the parties. J.A. 32, 35. A party-endorsed candidate is either a long-time party activist or a newcomer who is willing to vote the party line. J.A. 35-36. The endorsed candidate receives the benefits of voters' lists, organized party support, slate mailings and other forms of assistance usually associated with partisan elections. J.A. 32.

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[6] The state's interests in preserving confidence in the California judiciary are discussed at greater length in the brief of Amicus California Judges Association.



State law gives ballot-qualified parties numerous advantages in these endeavors. In addition to the influence and funding that arise from the official parties' right to control access to state primary elections, *see* Cal. Elections Code §§ 6430 *et seq.*, official parties receive public funds to pay for the expenses associated with the preparation and conduct of elections, including primaries. Cal. Elections Code § 10000. County central committees may submit party contributor envelopes or one-page solicitation letters to be mailed at public expense by the county clerk with the sample ballots. Cal. Elections Code § 10010.5.[7] The state collects contributions of up to 25 dollars on behalf of official parties as an option included on all California personal income tax returns. Cal. Revenue and Taxation Code §§ 18701 *et seq.*

California has given the parties these advantages to better enable them to fulfill their statutory role in the state's electoral system. That role is to conduct party primaries and campaigns for statewide office. As one commentator has noted:

> In statutory contemplation California party organs have been left with one major role – to campaign for the general election success of the party nominees selected by the voters at the primary. This role, according to statutory theory,

---

[7] In addition, county clerks are required to prepare at public expense sample ballots for political parties in primary elections, and mail those ballots to the voters. Cal. Elections Code § 10007. County clerks must also furnish state and county central committees with printed indices of registered voters without charge. Cal. Elections Code § 605.

> they perform under direction of the state and county central committees.

Friedman, *Reflections Upon the Law of Political Parties* (1956) 44 Cal.L.Rev. 65, 69.

Thus, California has opted for a system that places parties at the center of the statewide political system. If parties can endorse in nonpartisan elections, the danger is clear: they can convert the statutory advantages of their statewide role to disproportionate influence on local government and judicial officeholders, undermining California's system of nonpartisanship. Candidates will be subject to various "litmus tests" of their commitment to party platforms. *En banc* opinion, Alarcon, J., diss., Pet.App. A, p. A-59. Once the endorsed candidate is elected, the party can threaten the officeholder with the loss of party support. J.A. 30. The parties will be as directly and intimately involved in controlling local candidacies as if they actually controlled the nomination process. J.A. 28, 29.

Local government plays a unique role among government institutions. It affects the lives of the people most regularly and most directly. Local government issues the building permits, fixes the potholes and installs the "Slow – Children At Play" signs in front of schools. When a citizen asks the mayor, the city council or the school board to provide any of these basic services, the citizen should not have to worry that the request will be discounted or ignored because he or she is a Democrat rather than a Republican, or an Independent rather than a Democrat.

Many problems are first addressed at the local level, and local responses often form the foundation for state



and federal solutions. J.A. 32-33. Local government's capacity to address those problems depends upon its ability to attract to public office independent thinkers who are not willing to follow the party line just to be elected. J.A. 33-34. Participation by political parties in local elections will make it more difficult for such people to be elected to office. J.A. 34.

The interests underlying section 6(b) are the same as those found compelling in *Letter Carriers, supra*. In *Letter Carriers*, the Court upheld provisions of the Hatch Act, 5 U.S.C. § 7324(a)(2), which prohibited federal employees from engaging in partisan political activities. Although *Letter Carriers* addressed restrictions on speech by federal employees, its reasoning has been applied to regulations governing private individuals and nongovernment agencies. *Buckley v. Valeo*, 424 U.S. 1, 27 (1976).

The Court in *Letter Carriers* identified several governmental interests justifying the restrictions imposed upon First Amendment activities. 413 U.S. at 564-67. The first interest was the impartial administration of government. The Court recognized as "fundamental . . . that employees in the Executive Branch of the Government, or those working for any of its agencies, should administer the law in accordance with the will of Congress, rather than in accordance with their own will or the will of a political party." *Id.*, at 564-65.

The Hatch Act prohibited a wide range of political expression in order to protect and preserve that impartiality:

> A major thesis of the Hatch Act is that to serve this great end of Government – the impartial

> execution of the laws – it is essential that federal employees not, for example, take formal positions in political parties, not undertake to play substantial roles in partisan political campaigns and not run for office on partisan political tickets. Forbidding activities like these will reduce the hazards to fair and effective government. [Citations omitted.]

*Id.*, at 565. Further, avoiding the appearance, as well as the fact, of federal employees practicing political justice was recognized as a compelling consideration, "if confidence in the system of representative Government is not to be eroded to a disastrous extent." *Ibid.*

In addition, the Court recognized the need to protect good government by shielding the employees themselves from the effects of partisan pressures:

> A related concern, and this remains as important as any other, was to further serve the goal that employment and advancement in the Government service not depend on political performance, and at the same time to make sure that Government employees would be free from pressure and from express or tacit invitation to vote in a certain way or perform political chores in order to curry favor with their superiors rather than to act out their own beliefs. [Citations omitted.]

*Id.*, at 566. A corollary to that concern was the conviction that partisan influence and patronage ought not to be allowed to convert the rapidly expanding Government work force into a powerful and perhaps corrupt political machine. *Id.*, at 565.[8]

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[8] Again, the congruity between this concern and what motivated the author of section 6(b) is striking:

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This Court has described the interests identified in *Letter Carriers* as "interests of the highest importance." *Bellotti, supra,* 435 U.S. at 789. Because the same interests are at stake here, there can be no doubt that they are compelling.

The compelling nature of the state's interest in nonpartisanship distinguishes this case from *Eu v. San Francisco Democratic Central Comm.*, 489 U.S. 214 (1989). In *Eu*, this Court affirmed a decision striking down a ban on party endorsements in *party primaries* in California. The Court was persuaded by the fact that the primary was established as a way for the party and its members to choose their candidates for *partisan* office. 489 U.S. at 227, citing *Storer v. Brown*, 415 U.S. 724, 735 (1974). The Court reasoned that the state had no compelling interest in restricting a party's ability to communicate with its members concerning *its own decision-making process*. *Id.*, at 228.

Unlike this case, *Eu* did not involve the state's interest in the form of its judiciary and local government. In

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> The greatest danger in injecting political parties into the local elective process will be a not-so-subtle creation of a patronage network. The power of the state party leaders will no doubt increase greatly, opening the door for a centralized partisan power authority of incredible financial dimensions. In many Midwestern and Eastern states, the city, state, and county jobs are brokered by the political central committees.

Statement of Assemblyman Richard L. Mountjoy, quoted in panel opinion, Pet.App. B, p. A-103 fn. 32.

*Eu*, the Court found that the ban on pre-primary endorsements burdened the right of political parties to govern themselves as they see fit, because a partisan primary is by definition *their* election. A nonpartisan election, however, is not a device for settling differences within a party. Section 6(b) promotes the state's very different interest in preserving the nonpartisan structure of its government. *Eu* did not consider those interests and does not control this case.[9]

## III. ARTICLE II, SECTION 6(b) IS NARROWLY TAILORED TO SERVE CALIFORNIA'S INTEREST IN PRESERVING NONPARTISANSHIP

As discussed above, allowing political parties to make endorsements will give them a central role in nonpartisan elections. Winslow Christian, a former California trial judge, Associate Justice of the California Court of Appeal, and Executive Director of the National Center for State Courts, testified that party endorsements were incompatible with nonpartisan judicial elections:

> In my opinion, the independence of the California judiciary which is subject to election or public confirmation has depended upon the nonpartisan nature of judicial elections. Permitting partisanship in the process of nominating, selecting and retaining judges would force judges to seek party endorsements. This process

[9] *Abrams v. Reno*, 452 F.Supp. 1166 (S.D.Fla. 1978), *aff'd*, 649 F.2d 342 (5th Cir. 1981), cited by respondents, is distinguishable for the same reasons as *Eu*. In *Abrams*, the district court struck down a Florida statute prohibiting a state or county central committee from endorsing a candidate in the party primary.



> would create a risk of judicial candidates being tempted to promise to take party positions on legal issues which are pending or likely to arise. This harmful feature of partisanship in judicial elections has damaged the reputation of the judicial systems of certain other states known to me. The mere possibility of such political "deals" would undermine public confidence in the administration of justice.

J.A. 27-28. Justice Christian's testimony was uncontroverted. *En banc* opinion, Alarcon, J., diss., Pet.App. A, p. A-63. And history demonstrates the damaging impact on the independence of the judiciary and the integrity of local officials that resulted from party control. *Ibid*. True nonpartisanship is not achieved simply through the absence of party labels on ballots; it requires that judges and local officials enforce the law and execute the programs of government without indebtedness to any political party. Particularly in light of the special advantages conferred by the state upon official parties, endorsements put parties at the center of local and judicial elections, thereby eroding that impartiality.

Respondents advance five arguments that section 6(b) is not narrowly tailored. Each of these arguments is flawed.

### A. Section 6(b) Is Not Underinclusive

Respondents first assert that section 6(b) is underinclusive because it permits endorsements by nonpartisan entities which can also control judges and local officials. Respondents argue that there is no difference between these endorsements and party endorsements.

There are three answers to this claim. First, by definition, endorsements by non-parties do not threaten nonpartisanship. Second, there is no history of bossism or domination of local government by nonpartisan organizations in California, as there has been by political parties. Third, official parties are different from nonpartisan organizations in that the parties occupy a special position in the political arena by virtue of state-conferred advantages. This Court has previously held that such advantages are a permissible basis for differential restrictions on speech in elections. *See Austin, supra.*

In *Austin*, the Court upheld a state prohibition on corporations using general treasury funds in connection with state candidate elections. The Court held that the Michigan restrictions were justified by the unique, state-conferred legal and economic status that corporations enjoy:

> State law grants corporations special advantages – such as limited liability, perpetual life, and favorable treatment of the accumulation and distribution of assets – that enhance their ability to attract capital and to deploy their resources in ways that maximize the return on their shareholders' investments. These state-created advantages not only allow corporations to play a dominant role in the nation's economy, but also permit them to use "resources amassed in the economic marketplace" to obtain "an unfair advantage in the political marketplace."

110 S.Ct. at 1397, quoting *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 257 (1986)("*MCFL*").[10]

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[10] Significantly, the Court held that these special advantages justified restrictions not only on campaign contributions,

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Ballot-qualified political parties in California also possess unique legal and political advantages, conferred upon them by the state. *See* discussion at p. 15 *ante*. Primary among these benefits are (1) the power and fundraising capability afforded by the parties' guaranteed access to the state ballot, *see* Cal. Elections Code §§ 6430 *et seq.*; (2) the public subsidies official parties receive to prepare and conduct elections, Cal. Elections Code § 10000; (3) the parties' access to voter lists, Cal. Elections Code § 605; (4) the parties' right to send party contributor envelopes or solicitation letters to voters at public expense, Cal. Elections Code § 10010.5; and (5) the state's collection of taxpayers' voluntary contributions to official parties through California's personal income tax returns. Cal. Revenue and Taxation Code §§ 18701 *et seq.*

Due to these state-conferred advantages, ballot-qualified parties are uniquely situated to influence and exploit nonpartisan elections. If the parties are allowed to endorse, support and oppose candidates for nonpartisan offices, the parties will be able to use "resources amassed in the [partisan] marketplace to obtain an unfair advantage in the [nonpartisan] marketplace." The *Austin* Court recognized that Michigan had a compelling interest in "counterbalanc[ing] those advantages unique to the corporate form. . . . " 110 S.Ct. at 1400. California likewise has a compelling interest in counterbalancing, in the nonpartisan context, those political advantages unique to the ballot-qualified parties.

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but also on *independent expenditures*, which involve no *quid pro quo* or prearrangement with the candidate. 110 S.Ct. at 1395.

The Ninth Circuit attempts to distinguish *Austin* on the ground that it is limited to instances of financial corruption. Pet.App. A, p. A-5. As noted in Judge Rymer's dissent, however, the threat to an impartial judiciary and to fair and effective local government can arise from political as well as financial debt. Pet.App. A, p. A-42, citing *Bellotti, supra,* 435 U.S. at 788 fn.26 (importance of government interest in preventing corruption through creation of political debts "has never been doubted"), *Letter Carriers, supra,* 413 U.S. at 565 and *Buckley, supra,* 424 U.S. at 26-27.

While endorsements by other organizations may also create an appearance of political debt, only the official parties enjoy the state-conferred advantages that give party endorsements a disproportionate potential to distort the nonpartisan election process. Just as the economic advantages conferred on corporations may justify restrictions on First Amendment rights, so may the advantages conferred by California on the official parties justify restrictions on the parties' rights to endorse, support or oppose candidates in nonpartisan elections.

Respondents argue that the reasoning of *Austin* is inapplicable to organizations, such as political parties, whose influence derives from the popularity of their ideas rather than from their economic success. They cite *MCFL, supra,* 479 U.S. 238.

In *MCFL,* the Court held that a Massachusetts statute restricting corporate contributions to political candidates was unconstitutional as applied to a nonprofit "pro-life"



organization. Like the statute in *Austin,* the Massachusetts law was intended to address the danger that state-conferred economic advantages could be converted into political power. The Court reasoned that this danger was not present in the case of an organization which, by its very purpose, did not make use of those economic advantages. 479 U.S. at 259. The influence of such an organization derives solely from its popularity, not from the state-conferred benefits. *Ibid.* Thus, *MCFL* stands for the rule that the state cannot apply a facially valid restriction on speech to an entity that does not present the danger the restriction is meant to avoid.

That rule does not apply here. Parties do present the danger section 6(b) is meant to avoid. The influence and popular support of a California political party are directly related to its state-conferred benefits. Those benefits enhance the parties' resources, power and popularity. Section 6(b) ensures that the parties do not convert their state-supplied advantages in the partisan arena to undue influence in the nonpartisan arena. The provision is constitutional as applied to ballot-qualified parties.

### B. Section 6(b) Is Not Overinclusive

Respondents' second argument is that section 6(b) is overinclusive because it restricts the activities of even those relatively noninfluential parties whose endorsements would not sway an election. The Court rejected a similar argument in *Austin;* namely, that the Michigan state was overinclusive because it banned independent campaign expenditures even by noninfluential corporations. The Court emphasized that its concern was the potential to distort the political process by means of state-conferred advantages:

> **Although some closely held corporations, just as some publicly held ones, may not have accumulated significant amounts of wealth, they receive from the State the special benefits conferred by the corporate structure and present the *potential for distorting the political process. This potential for distortion* justifies § 54(1)'s general applicability to all corporations.**

110 S.Ct. at 1398 (emphasis added); *see also FEC v. National Right to Work Committee*, 459 U.S. 197, 209-10 (1982) ("While § 441b restricts the solicitation of corporations and labor unions without great financial resources, as well as those more fortunately situated, we accept Congress' judgment that it is the *potential* for such influence that demands regulation." Emphasis in original.) In this case, all of the ballot-qualified parties are beneficiaries of the statutory scheme, and all have the potential to use those advantages to distort the nonpartisan process.

### C. The Record In This Case Shows That Section 6(b) Is Necessary To Preserve Nonpartisanship

Respondents' third argument is that the City has failed to produce evidence of any harm resulting from party endorsements in nonpartisan elections before the voters specifically banned such endorsements in 1986. Absent such proof, respondents assert, the Court cannot conclude that the prohibition on endorsements is necessary to preserve nonpartisanship. This argument is based upon a false premise.

Respondents rely upon Justice Mosk's statement in *Unger II* that prior to the adoption of section 6(b). "It [was] customary for the governing bodies of political



parties to endorse or assist candidates in elections for nonpartisan offices." 37 Cal.3d at 616.

This assertion misreads the study on which Justice Mosk relied. *Id.*, at fn. 7, citing Lee, *The Politics of Nonpartisanship*, Tables 32 and 33 at 103 (1960) [attached as Appendix A to Petitioners' Reply Brief In Support of Petition for Certiorari]; *see also*, Pet.App. A, pp. A-8, A-9, A-14. Lee's survey does not show that party endorsements were customary before section 6(b) was enacted. The survey shows only that between 1956 and 1960, endorsements occurred in at most 9 percent of the responding counties and 7 percent of the cities. Given the wording of the questions asked in the survey, even these endorsements may have been made either by non-official political clubs (as opposed to central committees) or by party officials in their individual capacities.[11] Such endorsements would not be proscribed by section 6(b). Furthermore, none of Lee's data addresses judicial elections.

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[11] The question asked in Lee's survey was this: "In any election for city, county, or school office (not state or national office) in your county in the last four years, has there been any public or openly visible activity on the part of either political organization: county committee, local political clubs, party officials or representatives, etc.?" [Emphasis omitted.] Lee, at 102-03, 201. Responders in only 11 of 44 counties (25%) and 18 of 192 cities (9%) answered affirmatively. *Id.* When broken down by type of activity, the responses indicated that endorsements occurred in at most 4 of 44 counties (9%) and in at most 13 of 192 cities (7%). Lee, Table 33 at 103. Similarly, fundraising occurred in at most 7 of the 44 counties (16%) and at most 9 of 192 cities (5%). Lee, Table 33 at 103. Again, it is unclear whether these were funds raised by official parties or unofficial political clubs.

Thus, Lee's results provide no basis for concluding that party endorsements were customary before 1986. Indeed, the study supports the opposite conclusion: party endorsements in nonpartisan races occurred at most sporadically. Even the Ninth Circuit *en banc* court recognized that local party organizations in the vast majority of counties in California did *not* endorse in nonpartisan races before section 6(b) was enacted. Pet.App. A, p. A-1.[12]

Respondents are therefore wrong in asserting that California's tradition of independent local politics is unrelated to the state's limits on partisan political activity. From 1911 to 1986, California's political parties by and large refrained from the partisan activity that section 6(b) forbids. The absence of any history of Ruef-type

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[12] The record in this case shows that even former Governor and chair of the California Democratic Party, Edmund G. Brown, Jr., acknowledges that the general understanding prior to *Unger II* was that parties could not endorse in nonpartisan races. In his declaration in support of Amicus California Democratic Party's motion for rehearing before the Ninth Circuit, Brown testified that political parties in California have traditionally been weak, due in significant part to the fact that parties believed they could not endorse in nonpartisan races even before section 6(b) was enacted:

> For the better part of this century, political parties in California have been rendered impotent. *A significant factor contributing to party weakness has been the ban on party endorsements in primaries and nonpartisan races.*

Declaration of Edmund G. Brown, Jr., In Support of California Democratic Party's Motion for Rehearing, ¶8 (emphasis added).



machine politics in California since 1910 actually demonstrates the benefits which result when official parties do not endorse in local and judicial elections. As Judge Trott wrote in the original panel decision, "[t]he durability and efficacy of a solution should not be used as a reason to ignore its *raison d'etre*." Pet.App. B, p. A-97.

When California's nonpartisan solution was threatened by the decision in *Unger II*, the people did not wait to see the effects. Nor did they have to. The Court has repeatedly rejected the argument that "a State's political system [must] sustain some level of damage before the legislature [may] take corrective action." *See Munro v. Socialist Workers Party*, 479 U.S. 189, 195 (1986). In *Munro*, the Court held that a state was not required to make a particularized showing of actual harms suffered prior to the imposition of reasonable restrictions on ballot access. 479 U.S. at 194-95. Thus, even in the absence of definitive evidence on this issue, the voters of California are entitled to act on the basis of their reasonable belief that partisan endorsements are incompatible with a system of nonpartisan elections. *See generally, Paris Adult Theater I v. Slaton*, 413 U.S. 49, 60-63 (1973) (lawmakers may assume without scientific data that exposure to obscene material adversely affects individuals and society).

### D. No Less Restrictive Alternatives Are Available to Preserve California's Interest in Nonpartisanship

Respondents' fourth argument is that a ban on endorsements is not the least restrictive alternative necessary to preserve nonpartisanship. The Ninth Circuit cites

several existing provisions of the California Elections Code as examples of less drastic means of preserving nonpartisanship. Pet.App. A, p. A-8 fn. 4. Such provisions include (1) the prohibition upon party nomination of candidates for nonpartisan office, Cal. Elections Code § 37; (2) the requirement that nomination papers and candidates' statements for nonpartisan offices not refer to party affiliation. Cal. Elections Code §§ 6401.5, 10012; (3) the requirement that the candidate's party affiliation not appear on the nonpartisan ballot, Cal. Elections Code § 10200.5; (4) the provision that a voter may cast his or her ballot for a candidate for nonpartisan office without regard to party affiliation, Cal. Elections Code § 10214; and (5) the requirement that partisan and nonpartisan offices be listed separately in separate columns on the ballot form, Cal. Elections Code § 10207.

The least restrictive alternative test does not, of course, mean that *any* alternative will do. Courts must measure the suggested alternatives against the ultimate purpose that the challenged regulation is intended to advance:

> It is not helpful to ponder what is "less restrictive" without thinking about the functions the rules serve and how these functions would be affected by "less restrictive alternatives" *Every* alternative is more restrictive than some other one. [Emphasis in original.]

*Stevenson v. State Board of Elections*, 794 F.2d 1176, 1180 (7th Cir. 1986) (Easterbrook, J., concurring).[13]

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[13] Respondents' reliance on *Concerned Democrats v. Reno*, 458 F.Supp. 60 (S.D.Fla. 1978) is misplaced. In *Concerned*

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In this case, the function of section 6(b) is to keep judicial, school and local elections nonpartisan. In *Unger I*, the California Court of Appeals defined "nonpartisan" as follows:

> *"Not affiliated with or committed to the support of a particular party: politically independent . . .* viewing matters or policies without party bias . . . held or organized with all party designations or emblems absent from the ballot . . . composed, appointed, or *elected without regard to party affiliations of members . . . "* (Webster's New Internat. Dict. (3rd ed. 1965).

*Unger I, supra*, 102 Cal.App.3d at 685 (emphasis added); *see also, State v. District Court*, 122 Mont. 464, 476, 206 P.2d 166, 172 (1949) ("A nonpartisan is a person appointed or elected without regard to political affiliations; not controlled by parties or party spirit or interest.")

As these definitions reflect, banning party nominations and partisan nomination papers is a necessary but insufficient protection for nonpartisan elections.

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*Democrats*, the district court invalidated a Florida statute banning endorsements in nonpartisan judicial elections on the ground that less drastic alternatives were available. The court did not, however, consider whether Florida political parties had special advantages under state law, and did not analyze whether the alternatives really served the same *function* as the endorsement ban. Moreover, the statute in *Concerned Democrats* banned not only endorsements by official parties but also endorsements by any partisan political organization. 458 F.Supp. at 65. Section 6(b) regulates only the activities of official parties and hence does not suffer from the same over-inclusiveness.

These measures alone hardly insure that judges or municipal officeseekers will be elected "without regard to the[ir] party affiliations." If parties, with their special advantages, can endorse and support such candidates, as a practical matter, few candidates other than those backed by the parties will be able to compete successfully. J.A. 28, 29-30. As Judge Trott wrote in the original panel decision, permitting parties to circulate endorsements and support candidates in nonpartisan races "would undercut the statutory prohibition against party nominations to the point of rendering it useless." Pet.App. B, p. A-100.

Similarly, the statutory prohibitions on listing party labels on ballots is not enough to preserve nonpartisanship. *See* Cal. Elections Code §§ 6401.5, 10012.[14] To believe otherwise is to indulge the fiction that voters do not remember endorsement advertising and do not bring slate cards to the polls.

Thus, nonpartisan nomination and ballot procedures, whether singly or in combination, are not real alternatives to section 6(b). Indeed, respondents' argument

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[14] Curiously, while arguing for the adequacy of less restrictive alternatives to section 6(b), several of the parties who appear as respondents in this action, represented by the same counsel, seek to invalidate some of those alternatives. A Ninth Circuit panel rejected their First Amendment challenge to California Elections Code section 10012, banning references to party affiliation in candidates' statements for nonpartisan office. *See Mark v. Corwin*, 914 F.2d 1249 (9th Circuit 1990). However, the court recently granted rehearing *en banc* of that decision. *See Mark v. Corwin*, 924 F.2d 175, 1991 WL 7943 (Jan. 30, 1991).



concerning these "less drastic alternatives" is analogous to one rejected in *Buckley*:

> Appellants contend that the contribution limitations must be invalidated because bribery law and narrowly drawn disclosure requirements constitute a less restrictive means of dealing with "proven and suspected quid pro quo arrangements." But laws making criminal the giving and taking of bribes deal with only the most blatant and specific attempts of those with money to influence governmental action. And while disclosure requirements serve the many salutory purposes discussed elsewhere in this opinion, Congress was surely entitled to conclude that disclosure was only a partial measure, and that contribution ceilings were a necessary legislative concomitant to deal with the reality or appearance of corruption inherent in a system permitting unlimited financial contributions, even when the identities of the contributors and the amounts of their contributions are fully disclosed.

424 U.S. at 27-28. In the same vein, the people of California were entitled to conclude that prohibiting party nominations, banning statements of party affiliation on nominating papers and insuring a nonpartisan ballot were only "partial measures" in protecting the important interests advanced by nonpartisanship.

### E. Section 6(b) Is Not Overbroad On The Ground That It Imposes A Total Ban On Party Activity

Respondents' final argument is that section 6(b) is overbroad because it imposes "a total ban on any partisan gesture of support for or opposition to a candidate." Pet.App. A, p. A-8. But no lesser restriction would be

consistent with the preservation of an effective nonpartisan system.[15] The *Letter Carriers* Court rejected the argument that lesser restrictions upon political activities by federal employees might have been adequate:

> It may be urged that prohibitions against coercion are sufficient protection; but for many years the joint judgment of the Executive and Congress has been that to protect the rights of federal employees with respect to their jobs and their political acts and beliefs it is not enough merely to forbid one employee from attempting to influence or coerce another. . . . Perhaps Congress at some time will come to a different view of the realities of political life and Government service; but that is its current view of the matter, and we are not now in any position to dispute it. Nor, in our view, does the Constitution forbid it.

413 U.S. at 566-67. Similarly, the judgment of the people of California has been that to preserve nonpartisanship in local and judicial elections, it is not enough merely to ban party nominations. *See* Cal. Elections Code § 37. To appreciate the soundness of this judgment, one need only envision party slate mailers and bus placards bearing party endorsements in judicial races. As Judge Trott wrote in the panel decision below:

> It is likely that any process by which a major political party would decide whom to endorse – or support – would effectively determine who could and who could not run for that office. This is incompatible with California's rule that neither a party not its central committee may nominate a candidate for nonpartisan office; and it is certainly the very essence of what nonpartisanship is designed to avoid.

Pet.App. B, p. A-100.

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[15] As Judge Rymer points out in dissent, section 6(b) does not prevent individual members of party central committees from endorsing candidates. Nor does it prevent collective endorsements by members of central committees if they associate themselves under a different banner than that of the official party. Pet.App. A, p. A-36.



California must therefore be allowed to adopt a bright-line measure such as section 6(b), "if confidence in the system of [nonpartisanship] is not to be eroded to a disastrous extent." *Letter Carriers, supra,* 413 U.S. at 565. The state "need not choose a rule so much less restrictive that it also is useless in achieving the state's purposes." *Stevenson, supra,* 794 F.2d at 1180; *see also Storer, supra,* 415 U.S. at 736 ("[T]he Constitution does not require the states to choose ineffectual means to achieve its aims."). A ban on endorsements eliminates party influence over nonpartisan elections, as the voters of California intended when they adopted nonpartisanship for judicial and local offices. Section 6(b) is precisely drawn to prevent the specific danger identified by the state. It should be upheld.

## IV. ARTICLE II, SECTION 6(b) DOES NOT DENY EQUAL PROTECTION

Respondents have also argued in this litigation that section 6(b) violates that Equal Protection Clause of the Fourteenth Amendment. They have asserted that the measure unlawfully discriminates against parties because it does not ban endorsements by other entities which can also exert influence on nonpartisan officials.

Respondents included no Equal Protection claim in their complaint. J.A. 5, 6. Even if they could raise the claim now, however, it would be easily disposed. The argument is the same as respondents' earlier claim that section 6(b) is underinclusive for First Amendment purposes. It fails for identical reasons.

First, official parties and other entities are not similarly situated. The parties have special statutory benefits which advantage them in the nonpartisan arena. Moreover, given the fundamental rights at stake, the test under the Equal Protection Clause is the same strict scrutiny test that applies under the First Amendment. *See Police Department v. Mosely*, 408 U.S. 92, 101 (1972). As discussed above, compelling interests justify section 6(b) and it is narrowly tailored to serve those interests.

## V. CONCLUSION

For the reasons set forth above, this Court should reverse.

DATED: February 28, 1991

Respectfully submitted,

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